UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WINDSOR REDDING CARE CENTER, LLC, Respondent, and SEIU UNITED SERVICE WORKERS-WEST, CTW, CLC, Charging Party.	Case Nos. 20-CA-070465 20-CA-070964 20-CA-075426 20-CA-082287

RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER

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Pursuant to Section 102.48(c)(1) of the Board's Rules and Regulations, Respondent Windsor Redding Care Center, LLC, d/b/a Windsor Redding Care Center ("Respondent" or "Windsor Redding"), moves for reconsideration of the Decision and Order by a three-member panel delegated by the Board ("Panel") issued on July 17, 2018, in *Windsor Redding Care Center, LLC*, 366 NLRB No. 127 (July 17, 2018), and specifically those portions pertaining to the Panel's conclusion that Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and discharged Angelia Rowland. *See* 366 NLRB No. 127 at 1-3, 5-6. Reconsideration is warranted by material errors in the Decision and Order and extraordinary circumstances, as discussed below.

I. INTRODUCTION

The patent flaws in the Decision and Order are perhaps best illustrated by the Panel's inexplicable omission of six-plus pages of the decision of the administrative law judge ("ALJ"), including all three pages of the ALJ's analysis explaining that Respondent met its burden of showing it would have suspended and discharged Rowland even absent her union activity. This is sufficient in and of itself to warrant reconsideration, and is only the most obvious of many errors and omissions which pervade the Decision and Order.

- The Panel functionally rejected many of the ALJ's credibility findings, despite purporting not to do so, and failed to reconcile those findings with the Panel's rejection of the ALJ's conclusion on Rowland's discharge.
- The Panel omits numerous material facts which detract from its conclusion, such as:
  - credited testimony from three neutral witnesses (medical assistants not employed by Respondent) that Rowland "screamed" a threat of violence to an elderly nursing home resident, and written statements by these witnesses confirming their accounts, after Respondent's repeated emphasis of the seriousness of the situation and asking the witnesses if they were "really, really sure" of what Rowland did;
  - the ALJ's many reasons for discrediting a van driver who denied hearing Rowland scream her threat but was reluctant to cooperate;

- Rowland's total inability to explain why the three neutral witnesses would claim she screamed her threat if they did not believe she had done so;
- the full context of Gilles's comment "This is all about the Union," which contradicts the Panel's finding that this pertained to Rowland's discipline;
- Respondent's specific reasons for continuing the investigation after Rowland's discharge;
- Respondent's undisputed vigilance in identifying, preventing, and reporting elder abuse, and its "Zero Tolerance for Abuse" policy, which mandates suspension and discharge if an investigation establishes "willful abuse"; and
- Rowland's admission that if she had, in fact, screamed an abusive threat of physical violence at a resident – as Respondent found she did – her termination would have been appropriate on that basis.

• Given these omitted facts, the Panel has no basis for endorsing the General Counsel's argument that Respondent merely showed it "*could* have" discharged Rowland absent her union activity, when the evidence – including Rowland's admission – instead showed it "*would* have" done so, and in fact did.

- The Panel apparently concluded Respondent had the burden of proving the *absence* of disparate treatment, which is contrary to law and makes no sense.

- The Panel's lone support for its finding of disparate treatment is a single General Counsel exhibit which states that another employee was given a final warning in lieu of discharge for an incident that included "arguable" physical abuse and other less serious aspects. But the General Counsel presented no testimony on that exhibit, and neither the document itself nor any witness testimony reveals a finding of willful abuse, or corroboration of such a charge from any neutral witnesses.

- The Panel ignores the ALJ's finding that another "very active" Union member was not disciplined at all despite being accused of abusing the same resident that Rowland was found to have abusively threatened, and fails to explain why this does not detract from its baseless finding of disparate treatment as to Rowland.

- The Panel concludes Respondent's position was undercut because it continued its investigation after terminating Rowland, even though this argument was *never raised by the General Counsel or the Union*, in exceptions or otherwise. In so doing, the Panel misrepresents the evidence and ignores evidence that refutes its conclusion. The Panel's only legal support for this unasserted contention is a previously-uncited 1972 case which is inapposite

for a host of reasons – *e.g.*, the employer conducted no adequate *pre*-discharge investigation, and offered shifting and illogical reasons for the discharge – which were highlighted in the dissent but entirely ignored by the Panel.

These material errors and omissions have caused a miscarriage of justice. The Board should grant reconsideration, vacate the Panel's Decision and Order to the extent it concludes Respondent's suspension and discharge of Rowland violated the Act, and affirm the ALJ's conclusion on this issue.

II. THE PANEL FAILS TO ACKNOWLEDGE ITS FUNCTIONAL REJECTION OF THE ALJ'S CREDIBILITY FINDINGS, AND LARGELY IGNORES THE ANALYSIS BY THE ALJ AND THE DISSENT (p. 1, fn. 2).

The Panel asserts that it has "carefully examined the record" and finds "no basis for reversing" any of the ALJ's credibility findings. In fact, however, the Panel's decision shows that it functionally rejected many of the ALJ's credibility findings without acknowledging that it was doing so. *See David Saxe Productions, LLC v. NLRB*, 888 F.3d 1305, 1307 (D.C. Cir. 2018). There was particular reason for such deference here, since the ALJ actively examined several witnesses – including Anne Gilles, Windsor Redding's Administrator and Abuse Prevention Coordinator, and two of the three medical assistants from the doctor's office who heard Rowland scream an abusive threat of physical violence to a resident. (Tr. 732-733, 738, 742, 753, 811, 814-815, 825, 840; ALJD 4:38-39, 5:7-8, 10:45-11:1, 11:20-35.)

But like the Board in *David Saxe Productions*, the Panel fails to reconcile the ALJ's credibility findings with its rejection of the ALJ's conclusion that Respondent would have suspended and discharged Rowland even absent her protected union activity. The Panel also fails to account for evidence detracting from its dubious finding on this issue. In fact, the Panel largely ignores the analysis of both the ALJ and dissenting Member Emanuel.

III. THE PANEL'S DECISION AND ORDER INEXPLICABLY OMITS MORE THAN SIX PAGES FROM THE ALJ'S DECISION, INCLUDING THE ALJ'S ENTIRE DISCUSSION OF HOW RESPONDENT MET ITS BURDEN UNDER *WRIGHT LINE* AS TO ROWLAND'S SUSPENSION AND DISCHARGE (p. 2).

From page 11 through the first full paragraph of the left column of page 21, the Decision and Order appears to include all of the ALJ's Decision ("ALJD") through page 18, line 30 – ending with the paragraph where the ALJ found "Rowland engaged in significant union activities" which were "well known to the Respondent's management." (ALJD 18:23-30.) However, the Panel omits the next six-plus pages of the ALJ's Decision, from page 18, line 32, through the end of page 25 – *including, most critically, the entirety of the ALJ's three-page discussion that Respondent met its burden of showing "it would have taken the same disciplinary action against Rowland absent her union activity*." (ALJD 19:2-21:51, italics added.) The Panel thus fails to account for *any* of the ALJ's reasons for finding that Respondent met its

rebuttal burden under *Wright Line*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

IV. THE PANEL'S FACTUAL SUMMARY MISSTATES MATERIAL FACTS, AND OMITS NUMEROUS OTHERS WHICH REFUTE ITS FINDING THAT RESPONDENT'S DISCHARGE OF ROWLAND VIOLATED THE ACT.

A. Omitted or Misstated Facts Regarding Gilles's Pre-Discharge Witness Interviews and Consistent Accounts of Rowland Screaming an Abusive Threat to a Resident (p. 2)

The Panel depicts the three medical assistants from the doctor's office (Terra Pagnano, Erica Catona, and Lindsay Murphy) as stating that Rowland merely "said" to an elderly resident, "***If you don't knock it off, I'm going to beat your ass***." In fact, the ALJ found that *all three* medical assistants confirmed their genuine belief that Rowland "***screamed***" this abusive and disturbing threat on Thursday, May 24, 2012. All three witnesses were shocked, as none had ever encountered any patient being treated in this manner. Pagnano reported the incident by phone to Windsor Redding's Director of Nursing, Jane Thimmesch, who never had received a similar call from a doctor's office in 40 years of nursing, and was so shocked she phoned back to the doctor's office to make sure Pagnano's call was not a crank. (ALJD 10:45-11:1, 11:20-35, 12:4-15, emphasis added; Tr. 703-705 [Gilles], 797-803 [Pagnano], 810-816 [Catona], 825-828, 831, 837 [Murphy], 926-932 [Thimmesch].)

Anne Gilles, Windsor Redding's Administrator and Abuse Prevention Coordinator (ALJD 4:38-39, 5:7-8), stressed the seriousness of the situation during her initial interview with Catona and Murphy, telling them that this could mean Rowland's "certification, her livelihood," indicating she might have to terminate Rowland and they would not see her again, and asking them if they were "really, really sure." (ALJD 11:20-25; Tr. 703-705, 714-721 [Gilles], 810-820 [Catona], 825-827, 831-834, 837 [Murphy], 927-932 [Thimmesch].) Both Catona and Murphy thereafter prepared separate written "Telephone Encounters" which memorialized their conversations with Gilles and reiterated the threat they heard Rowland make. (ALJD 11, fn.15; R. Exs. 31, 32.)

Gilles testified that when she approached the driver, Lewis Johnson, he had his hat pulled down low and was preoccupied playing with an electrical device, never looking up from it. (ALJD 11:37-44; Tr. 704-707.) Gilles later prepared a written note of this conversation. (ALJD 11, fn. 16; R. Ex. 26.) Based on the way Johnson acted and his brief answer, Gilles assumed that he either had not been paying attention to the interaction between Rowland and the resident, or did not want to get involved. (ALJD 11:44-12:2; Tr. 704-707.) The ALJ was less convinced of Johnson's credibility than he was of the three medical assistants who believed Rowland had screamed the abusive remark. (ALJD 12:4-30.)

Gilles interviewed Rowland in the presence of her Union representative, Ron Rich; her supervisor, Brett Funk; and Jane Thimmesch. (ALJD 12:32-26; Tr. 705-711.) Gilles informed Rowland of the complaint from the doctor's office that Rowland had threatened the resident, and that three medical assistants all said the same thing. Rowland denied making any threat, *but offered no explanation as to why the medical assistants would say such a thing*. Gilles asked Rowland to think about what had transpired in the doctor's office and whether something that she said might have been misinterpreted by the witnesses. Gilles advised Rowland of her suspension for alleged verbal elder abuse pending the outcome of an investigation, and gave Rowland a Corrective Action Memo to this effect. Rowland wrote on the Memo, "I did not say or do anything out of line to [the resident]. The Merit driver was w/us while entering & leaving the building." (ALJD 12:36-45; Tr. 711-712; G.C. Ex. 9; see Tr. 735, 775 [Merit is the company that employed the van driver].)

Gilles continued with her investigation the next day, Friday, May 25, because she and Thimmesch were aware of the resident's difficult nature and that she frequently screamed various threats and profanities towards the staff and others. They also knew Rowland was a good employee with no disciplinary record. (ALJD 12:47-52; Tr. 714.) Gilles again emphasized the seriousness of the allegation, and asked the three assistants if they were still

sure that Rowland had made the threat in question. All three medical assistants continued to insist that they heard the resident and Rowland yelling over each other at the same time, and that it was Rowland who made the threat. Each witness then prepared a written statement as to what had transpired, which written statements were consistent with the oral statements they had previously given to Gilles and Thimmesch. (ALJD 12:52-13:6; Tr. 714-717 [Gilles], 797-801 [Pagnano], 816-820 [Catona], 831-833 [Murphy]; R. Exs. 27-29.)

B. Omitted or Misstated Facts Regarding Meetings Leading up to Rowland's Discharge (p. 2)

CNA Alice Martinez accompanied Rowland at around 11:30 or 11:45 a.m. on Friday, May 25, when Rowland had Gilles sign a note excusing Rowland's absence due to the suspension of the previous day. (ALJD 13:8-11; Tr. 344-346, 418-425 [Rowland], 480-483, 498 [Martinez], 721-723 [Gilles]; R. Ex. 8.) Rowland asked Gilles, "Why would these people in the [doctor's] office do this? Why? Why? Why? Why? Why would they do this? I don't understand." Gilles responded that she did not understand either, but that "the public doesn't know" what is done in nursing homes, and only knows "what they read, see, and hear from other sources," which "are always negative about nursing homes." Gilles explained: "when we're in public, we really have to be exemplary, ... especially with a patient," and Rowland

"really needed to look at the situation and how it happened and try to figure out what could they have mis – what could they have possibly misinterpreted?" (Tr. 349-350 [Rowland], 724-725 [Gilles].)

According to Rowland and Martinez, in the context of discussing the public perception of nursing homes, Gilles brought up the subject of signs posted on employees' cars near the facility, and indicated *it was wrong for such signs to mention patient care due to the bad public perception this foments*, but instead should focus on the contract dispute and the Union's efforts to obtain a fair contract. (ALJD 13:15-23; Tr. 349-352, 425-428 [Rowland], 482-483, 499-500 [Martinez].) Martinez said to Rowland, "we're not here for the Union. We're here for your job." Gilles then said, "Oh no. This is about the Union. This is all about the Union." No witness testified as to what Gilles allegedly meant by "this." At that point, Rowland thanked Gilles for signing the letter, and she and Martinez left. (ALJD 13:23-26; Tr. 354, 428-429 [Rowland], 482-483 [Martinez].) Gilles discussed signs on employees' cars at a later staff meeting Friday at 2:30 p.m. (Tr. 484-491 [Martinez], Tr. 725-727 [Gilles].) Gilles denied raising the subject in her earlier meeting with Rowland and Martinez, but the ALJ found otherwise. (ALJD 13:28-46.)

After the 2:30 p.m. staff meeting, later in the afternoon on Friday, May 25, Gilles had a conference call with several employees of SNF Management, the company which had managerial oversight responsibility for Windsor

Redding, to discuss Rowland's situation. The participants included the Regional Director of Operation, Ken Cess, who is based in Concord, California; the Human Resources Manager, Yolanda Thomas; and the Human Resources Director, Hanita Hoffman. (ALJD 13:48-51; Tr. 661-662, 672, 720-721, 725, 733, 782 [Gilles], 841-842, 897-898 [Cess].) Gilles testified that they discussed the fact that Rowland had been a good employee who had never previously been accused of any inappropriate conduct towards a resident. However, as there were three totally independent witnesses who had no motivation to lie about Rowland, each of whom insisted that she had threatened the resident, *they made a collective decision* to terminate Rowland for elder abuse. (ALJD 13:51-14:4; Tr. 720-721, 725, 733, 782 [Gilles], 882-883 [Cess].)

On Tuesday, May 29 (the next business day after the Memorial Day holiday weekend), Gilles and Thimmesch met with Rowland and Rich. As the meeting began, Rowland handed Gilles a handwritten statement in which she denied that she had threatened the resident, and claimed that her suspension was in retaliation for her union activity, although this statement *did not mention* any "all about the Union" remark from the preceding Friday. (ALJD 14:6-9; Tr. 737 [Gilles]; G.C. Ex. 10.) Gilles testified that she asked how Rowland had come to the conclusion that the termination was related to union activity when three impartial witnesses had accused Rowland of

abusing the resident. *Rowland had no answer*. Gilles then informed Rowland that based on the unequivocal accounts of the three medical assistants, she had no choice but to terminate Rowland. (ALJD 14:9-13; Tr. 729-730.)

Gilles gave Rowland a termination notice stating that Rowland was being fired for violating the Respondent's elder abuse policy by yelling at a resident. In turn, Rowland wrote on the corrective action form that Gilles had not properly investigated the claim against her by not interviewing the van driver. (ALJD 14:13-16; G.C. Ex. 11.) Gilles denied that Rowland's termination had anything to do with her union activity. (ALJD 14:13-17; Tr. 738.) Rowland admitted she got along fine with Gilles, and that she remained on the Bargaining Committee even after her termination, without protest from Respondent. (Tr. 395-396, 402.) Rowland denied engaging in the charged conduct, but agreed that *if* she had done so, *it would have been appropriate for her to be terminated*. (Tr. 392.)

C. Omitted or Misstated Facts Regarding Further Investigation (p. 2)

Gilles and other members of the management staff at the facility were distressed and upset at Rowland's termination, because Rowland had always been considered a good employee. The ALJ inferred that Gilles thus was willing to continue the investigation in order to ensure that a mistake had not been made in terminating Rowland. (ALJD 14:19-26.)

According to Gilles, because of Rowland's criticism that Gilles did not interview the van driver, Johnson, Gilles thought perhaps she did not do everything she should have, and she therefore called the van company and asked a dispatcher if she could speak with Johnson. The dispatcher called Gilles back later that day with a message from Johnson that the resident screamed the entire time he was with her, and that he does not pay any attention to her, and just "tunes it out." Gilles memorialized the conversation with a file note. (ALJD 14:28-33; Tr. 733-736; R. Ex. 30.) Johnson's testimony was similar, but he placed the contact about one week later, and claimed that he told the dispatcher to inform Gilles that "nothing happened." (ALJD 14:33-36; Tr. 458-459.) Ken Cess also attempted to talk with Johnson, and left a message for him with the dispatcher, but Johnson never returned the call, and claimed to have lost Cess's call back number. It was clear to the ALJ that Johnson was hardly anxious to talk with Respondent's managers about the Rowland incident. (ALJD 14:36-40; Tr. 458-460 [Johnson], 704, 727, 733-736, 741 [Gilles]; R. Ex. 26.)

Cess also drove from Concord to Redding (nearly 200 miles) to interview Pagnano and Murphy within about five days of his receipt of their written statements of Friday, May 25 – meaning he interviewed them on or about May 30, two business days after he received the statements, and one day after Rowland's May 29 termination. The third medical assistant,

Catona, was unavailable on that occasion. (ALJD 14:42-46; Tr. 662 [Gilles], 801-802 [Pagnano], 833-834 [Murphy], 878-883, 895-896 [Cess].) Cess wanted to satisfy himself that there was no doubt in the minds of these witnesses as to what they had observed, so he went to Redding to conduct the interviews. Both witnesses indicated that "they heard two distinct voices," and that the threat was made in a "harsh tone" from the "second female voice," not the resident. (ALJD 14:46-50; Tr. 880-883.)

The ALJ noted that on May 24, Gilles reported this incident to the State of California's Department of Public Health and to the Ombudsman. Gilles did not report the incident to the police because "the resident wasn't in danger of being physically harmed" even before Rowland's suspension, given the number of witnesses at the doctor's office where she made the threat. The state investigated the claim and ultimately concluded that there were "no deficiencies," as Respondent had complied with state and federal law and its own policies in promptly reporting and investigating the incident. (ALJD 14:52-15:5; Tr. 674-677 698-699, 711, 740 [Gilles]; G.C. Exs. 12, 21.) The ALJ added that Rowland still has her CNA license, which was not revoked as a result of the incident being reported to the state. (ALJD 15:5-7; G.C. Ex. 13.)

V. THE PANEL'S LEGAL DISCUSSION INCLUDES MULTIPLE ERRORS AND FAILS TO ACCOUNT FOR THE ANALYSIS OF THE ALJ AND THE DISSENT AS TO HOW RESPONDENT MET ITS BURDEN UNDER *WRIGHT LINE*.

A. The Panel Omits Critical Facts Supporting the ALJ's Finding that Respondent "*Would* Have" Suspended and Terminated Rowland Based on Its Finding of Elder Abuse, Even Absent Her Protected Union Activity (pp. 2-3).

The evidence credited by the ALJ emphatically establishes that Respondent carried its rebuttal burden of proving "it *would* have suspended and terminated Rowland's employment absent her protected union activity." And there was *no evidence* that Respondent "merely ... *could* have done so." This was pure argument by the General Counsel, based solely on an inapposite case where there was "significant countervailing evidence of disparate treatment" which the respondent failed to contest or persuasively rebut. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999).

The Panel *entirely ignores* the ALJ's findings and the overwhelming supporting evidence regarding how vigilant Windsor Redding is about identifying and preventing elder abuse, and reporting any suspected abuse. (ALJD 4:7-16, 19:9-23; R. Ex. 19.) Skilled nursing homes such as Windsor Redding have an obligation under California law to report known or suspected instances of elder or dependent adult abuse. *Failure to do so is a crime*. Cal. Welf. & Inst. Code §§ 15610.30(g), 15630(b)(1). Further, all employees who work in long-term care facilities, including support and

maintenance staff, are "mandated reporters." *Id*. § 15610.17. Mandated reporters have an individualized duty, separate and apart from their employment duties, to report known or suspected abuse to the appropriate state or local authority. This mandatory reporting duty is triggered if the reporter has observed or have knowledge of an incident; has been told by an elder or dependent adult that he or she has experienced abuse; or reasonably suspects abuse has occurred. *Id*. § 15630(b)(1). Mandated reporters must follow specific requirements for reporting known or suspected cases of abuse to the proper authorities. *Id*. § 15630(b)(1)(A). To ensure that suspected elder abuse is recognized and reported, both California and federal laws require residential care facilities to provide training and continuous education to all staff. (ALJD 4:18-30; R. Ex. 14.)

Windsor Redding maintains an Abuse Prevention and Procedure Manual, which advises employees that Respondent has a policy of "Zero Tolerance for Abuse," and details the mandatory reporting requirements for suspected resident abuse. (ALJD 4:32-34; Tr. 599, 607, 631-633 [Gilles]; R. Ex. 18.) Respondent's policy states that any employee "suspected of alleged abuse *will be suspended during the investigation and ultimately terminated if the investigation confirms willful abuse*." (R. Ex. 20 at 3, italics added, quoted at ALJD 4:34-37.) In addition to the legal duty to report suspected abuse to the state, employees must report suspected abuse directly to Gilles, or in her

absence to the Director of Nursing or the Nurse Supervisor on duty. (ALJD 4:37-40; Tr. 632 [Gilles]; R. Ex. 18.) Employees are advised of the location of the Abuse Manual, and that they may review the resident abuse policies at any time. (ALJD 4:40-41; Tr. 607, 627-632 [Gilles], 885-889 [Cess]; R. Exs. 15, 16.)

Respondent provides training twice each year for all employees, plus initial training for new employees, on their legal duties as mandated reporters. These training sessions include a video, produced and distributed by the State of California, entitled, "Your Legal Duty … Reporting Elder and Dependent Adult Abuse," which was played on the record during the hearing. (ALJD 5:1-5 & fn. 7; Tr. 604-605, 955-978 [Gilles]; R. Ex. 14.) This video is intended to educate nursing home staffs regarding different types of patient abuse, how to recognize abuse, the procedure for reporting suspected abuse, and the consequences for failing to do so. When employees were shown this video, a trainer would conduct question and answer sessions to ensure they understood their duties and responsibilities to prevent and report abuse. (ALJD 5:5-10; Tr. 605, 632 [Gilles]; R. Ex. 14.)

Employees at training sessions also receive a copy of the legally mandated reporting requirements, which they sign as evidence of receipt. Rowland signed such a receipt. (ALJD 5:10-13; Tr. 442-444; R. Exs. 3, 9-13.)

The ALJ found no dispute that if the incident of which Rowland was accused occurred – *i.e.*, screaming in a harsh tone a threat of bodily harm to a resident, specifically, "***If you don't knock it off, I'm going to beat your ass***" – this would constitute elder abuse. This was distressing to Gilles, because Rowland was a superior employee, a kind and gentle caregiver, and never previously had been accused of any sort of elder abuse. (ALJD 19:9-23, 21:2-8; Tr. 738.)

The ALJ specifically rejected the General Counsel's contention that the punishment issued to Rowland was disproportionate to the infraction: "A threat screamed at a nursing home resident to cause her physical harm is not a minor matter. It is extremely serious, and society views such conduct directed at vulnerable elderly people as such, which is evident by the abundance of state and federal laws designed to protect the elderly." (ALJD 21:10-15.)

Windsor Redding did not have a progressive discipline policy, and considered Rowland's conduct so egregious as to warrant immediate termination. Although there was no evidence in the record of similar misconduct by any other employee, the ALJ found it likely that this *would have* resulted in similar disciplinary action, even if the employee had not engaged in protected activity. (ALJD 21:40-44.)

The Panel indicates Rowland merely acknowledged that "Respondent likely *could* have disciplined [her] for engaging in the conduct for which she was accused." (366 NLRB No. 127, at 3, italics in original.) But Rowland's actual concession was far more forceful than that: she admitted that *if* she had engaged in the charged conduct, *it would have been appropriate for her to be terminated*, not merely that she "*could* have" been discharged. (Tr. 392.) Since Respondent concluded that Rowland actually committed an act of verbal elder abuse as alleged, the evidence uniformly demonstrated that it would have discharged Rowland *regardless* of her union activities.

B. The Panel Appears to have Erroneously Assigned Respondent the Burden of Disproving Disparate Treatment, and Its Analysis Contains Multiple Errors and Omits Material Facts (p. 3).

Although the Panel is far from clear on this point, it appears to erroneously assign Respondent the burden of establishing the *absence* of disparate treatment – which is what the General Counsel essentially argued. (*See* A.G.C. Brief in Support of Exceptions at 27.) However, where disparate treatment is alleged, the burden is on the General Counsel to demonstrate its *existence*, not on the Respondent to prove its absence. *See Avondale Industries,* 329 NLRB at 1066, quoting *Merillat Industries, Inc.,* 307 NLRB 1301, 1303 (1992) (both describing disparate treatment as "countervailing evidence" to respondent's affirmative defense); *Wright Line*, 251 NLRB at

1091 (describing evidence of disparate treatment as "undermining Respondent's defense"); *id*. at 1097 (ALJ decision) ("Disparate treatment is obvious; discrimination proved."). Otherwise, this would lead to the patently-absurd result that an employer who had not previously encountered a sufficiently-similar situation automatically would be found to have violated the Act merely because it faces a case of first impression.

The Panel's discussion also omits material facts which refute its finding of disparate treatment. *Counsel for the General Counsel never presented witness testimony from Gilles or anyone else about the discipline of Nancy Antonson*, but instead relied exclusively on "record evidence" (ALJD 21:17-20) – *i.e.*, G.C. Exhibit 20, the Corrective Action Memo on the incident of April 27, 2012. That Memo states it was "[r]eported by a resident" – not "found" by Respondent – that the resident "was handled roughly" and that this "continued" after the resident asked Antonson "to be careful" as "her legs are painful." The Memo did not suggest Antonson handled the resident roughly a *third* time, as the Panel baselessly implies. The Memo also includes Antonson's statement, which said in pertinent part: "Resident's legs are extremely sensitive as I found out *after barely touching behind her knees* while in the shower. While performing routine patient care to change resident's brief I again *unintentionally touched gently behind legs* to assist

resident to roll to appropriate side. Resident exclaimed pain when touching legs...." (G.C. Ex. 20 at 1-2, italics added.)

The General Counsel presented no witness testimony at all regarding this Memo, even though a separate issue raised in the Memo was discussed during Gilles's direct examination (*i.e.*, Antonson's facial expression and remark when the resident had an involuntary bowel movement, which were not alleged to have constituted violence or abuse). (Tr. 749-753.) Thus, there was no evidence that Respondent disbelieved Antonson's explanation for why the resident felt she was handled roughly – and, indeed, that explanation did not inherently contradict the resident's own report.

Moreover, there was *no evidence of neutral witnesses* to the Antonson episode. As Member Emanuel aptly notes, this contrasts with the "three neutral, credible witnesses to Rowland's misconduct," each of whom "gave detailed, consistent accounts" which the ALJ explicitly credited.

There also was no evidence that Respondent found Antonson had committed "willful abuse," under which an employee "will be" (not "could" be) suspended and discharged pursuant to Respondent's "Zero Tolerance" policy. (R. Ex. 20 at 3.) By comparison, none of the three witnesses to Rowland's misconduct ever had encountered a patient being shouted at in a similarly abusive manner, nor had Thimmesch ever heard of such an incident. (Tr. 797-798 [Pagnano], 810-812 [Catona], 825-827 [Murphy], 926-932 [Thimmesch].)

The Panel's reference to Respondent's "report of suspected dependent/elder abuse with the state" omits critical contextual facts. As noted above, both applicable California law and Respondent's own policies *require any suspected abuse*, as well as known abuse, to be reported to the State. "Failure to do so is a crime." (ALJD 4:18-41; Tr. 630-632 [Gilles], 885-889 [Cess]; R. Ex. 18 at 21.) Thus, contrary to the Panel's loose suggestion, Respondent's legally-mandated report of the Antonson incident was not at all tantamount to a "finding" by Respondent that Antonson engaged in willful physical abuse.

The Panel's assertion that "Respondent failed to explain why it reacted differently to an arguable act of physical abuse than it did to an arguable act of verbal abuse" is a *false equivalency*. Quite unlike the purely-documentary evidence regarding Antonson, Rowland's act of verbal abuse was not merely "arguable"; it was corroborated by three neutral witnesses, all credited by the ALJ, and was found by Respondent and the ALJ to have actually occurred.

The Panel therefore errs in dodging the question "whether Rowland actually made the threat in question." While Respondent did not have the burden of proving Rowland actually committed misconduct, the ALJ's finding of an actual threat further bolsters his conclusion that "the record evidence relied on by [counsel for the General Counsel] does not support her contention" of disparate treatment.

The Panel further ignores evidence cited by the ALJ that demonstrates the *absence* of disparate treatment: Ron Rich, a "very active" Union member who served as shop steward and attended disciplinary meetings as a Union representative (including for Rowland), was accused of abusing *the same resident* that Rowland was found to have threatened. Yet, Gilles took *no action* against Rich, instead determining that the anonymous source who provided the incident report was apparently unfamiliar with the resident and her behaviors. (ALJD 21:29-38; G.C. Ex. 16.)

C. The Panel Never Should Have Considered Issues Pertaining to Respondent's Post-Discharge Investigation Which *Never Were Raised* by the General Counsel or Union, and the Panel's Discussion Is Replete with Factual Distortions and Flawed Legal Analysis (p. 3).

Although the General Counsel argued that Respondent's investigation of Rowland was inadequate, the General Counsel and Union *never contended*, in exceptions or otherwise, that Respondent's position was undercut by its *continuation* of the investigation after discharging Rowland, nor did either of them cite to *Lowery Trucking Co.*, 200 NLRB 672 (1972), the pre-*Wright Line* case on which the Panel now relies. The Panel should not have reached this issue, pursuant to Section 102.46(f) of the Board's Rules and Regulations.

Worse still, the Panel grossly distorts the evidence, and ignores evidence that contradicts its conclusions. Gilles *initially* had "significant

doubt as to the veracity" of the charge against Rowland, but that was *before* she and her colleagues interviewed the three neutral witnesses and obtained written statements from each of them – *not afterwards* as the Panel misleadingly portrays. (Tr. 703-705, 714-721, 736-738, 741 [Gilles], 798-800 [Pagnano], 810-820 [Catona], 831-834 [Murphy], 878-883 [Cess], 929-932 [Thimmesch].) The only post-discharge doubt harbored by Gilles, prompted by what Rowland wrote on her termination notice, was whether she had done everything she should have to interview the recalcitrant van driver, Johnson. (Tr. 733-736; R. Exs. 26, 30.)

The regional director, Ken Cess, testified it was "pretty unusual" for him to be "directly involved" in an investigation, but he did so here in part because of Rowland's Union affiliation, the fact that Respondent's Union negotiations were at an initial and difficult stage, and the desire to avoid a ULP charge based on an allegedly inadequate investigation. Cess drove nearly 200 miles from Concord to Redding, California, to interview the medical assistants who witnessed the incident. He could not recall when he did this, but it was within five days of receiving the witnesses' written statements of Friday, May 25 – meaning on or about May 30, which was two business days after he received the statements and only one day after Rowland was discharged. Cess also made clear he would have made the same

termination decision regardless of whether Rowland was involved in the Union. (Tr. 662, 878-883, 895-896; ALJD 14:36-50.)

The Panel does not bother to explain why Respondent's reasons for its abundantly-cautious post-discharge investigation are any less "logical" than the alternative of further delaying Rowland's termination, particularly since: (1) the Panel tacitly concedes, as the ALJ found, that the pre-discharge investigation was sufficiently thorough; and (2) the post-discharge investigation uncovered nothing new. The Panel ignores Member Emanuel's point that there was no suggestion Respondent was uncertain about the discharge decision or sought to manufacture a defense after the fact.

The Panel also disregards all of the material distinctions between this case and *Lowery Trucking*, 200 NLRB at 677 – including all of the reasons stated in that case for finding that continuing the investigation suggested uncertainty as to the ground for discharge. The respondent in *Lowery Trucking* offered several different reasons for terminating employee Holmes. *Id*. It initially relied on a single witness's account that Holmes remarked during a coffee break that he would have backed clear over a car he accidentally hit if he had known it was a Company "safety car" or if it had belonged to the business's owners. *Id*. The Company's owner claimed "he thought Holmes was threatening his life" during the termination meeting, but "vacillated" during his testimony and alleged Holmes's "attitude" was the

reason for the discharge. *Id*. The employer conducted basically no pre-discharge investigation, and the persons the employer interviewed after the discharge gave conflicting accounts, including one who contradicted himself from direct to cross-examination at the hearing. *Id*. The judge in *Lowery Trucking* cited these specific facts as showing the Respondent remained uncertain about the ground for discharge even after the decision was made. *Id*. He also concluded that "nothing occurred at the meeting which would be a logical ground for discharge." *Id*.

The Panel does not, and cannot, contend the instant facts are remotely similar to those in *Lowery Trucking*, which explains why neither the General Counsel nor the Union relied on that patently inapposite case. As Member Emanuel summarized, "the Respondent's pre-discharge investigation was thorough, the Respondent's managers deliberated carefully before deciding to discharge Rowland, there was no vacillation as to the reason for Rowland's discharge, and no new witnesses were interviewed during the post-discharge investigation." The Panel therefore lacks any valid factual or legal basis for contending that the continuation of the investigation after Rowland's discharge somehow negates Respondent's showing that it *would* have terminated Rowland irrespective of her union activities.

D. Gilles's "All About the Union" Remark Does Not Carry the Weight the Panel Assigns to It (pp. 2-3).

The Panel describes Gilles's "all about the Union" statement as "extraordinarily candid" and pertaining directly to "Respondent's motivation for taking action against Rowland" – *i.e.*, an "admission that its discipline of Rowland was 'all about the Union.'" But the Panel's interpretation is not supported by Rowland's and Martinez's testimony, as credited by the ALJ.

The Board initially errs by claiming the meeting was "to discuss Rowland's suspension." Not so. The purpose of this meeting, between 11:30 and 11:45 a.m. on May 25, was to have Gilles sign a note *excusing Rowland's absence* due to the suspension. (ALJD 13:8-11; Tr. 344-346, 418-425 [Rowland], 480-483, 498 [Martinez], 721-723 [Gilles]; R. Ex. 8.)

The Board is equally off base to assert that "Gilles gratuitously turned the conversation to the Union." In fact, Gilles discussed the Union only after mentioning the public's negative perception of nursing homes and raising the possibility that the three medical assistants might have misinterpreted what happened at the doctor's office the previous day. (Tr. 349-350 [Rowland], 724-725 [Gilles].) The only Union "tactics" Gilles "criticized" were the signs' focus on patient care instead of contract issues. (ALJD 13:15-23; Tr. 349-352, 425-428 [Rowland], 482-483, 499-500 [Martinez].) Gilles said "[t]his is all about the Union" after Martinez said to Rowland, "we're not here for the Union.

We're here for your job." But neither Martinez nor Rowland testified as to what Gilles allegedly meant by "this" – much less that Gilles was referring to Rowland's discipline, as the Panel leaps to infer. (Tr. 354, 428-429 [Rowland], 482-483 [Martinez].)

Although the Panel characterizes Rowland's discharge to have occurred "soon thereafter," there actually was a lapse of *several hours* from Gilles's meeting with Rowland and Martinez (before noon) to the conference call in which three management employees concurred with Gilles in the termination decision. That conference call came after completion of a 2:30 p.m. staff meeting, in which Martinez confirmed that Gilles said signs on employees' cars parked outside the facility should focus on contract issues rather than patient care – entirely outside the context of Rowland's discipline. (ALJD 13:48-54; Tr. 484-491 [Martinez], 661-662, 672, 720-721, 725-727, 733, 782 [Gilles], 841- 842, 882-883, 897-898 [Cess].) And the suspension decision had been made one day earlier, on May 24. (ALJD 12:36-45; Tr. 711-712.)

The ALJ credited the testimony of Martinez and Rowland against that of Gilles only on the singular point of the "all about the Union" remark (ALJD 13:8-46), and found that it supported the General Counsel's *prima facie* showing under *Wright Line* and its progeny, because there "appear[ed] to be a nexus or connection between Rowland's union activity and her suspension and subsequent discharge." (ALJD 18:16-19:2.) *Despite this, however, the ALJ*

went on to conclude that Respondent showed by a preponderance of the evidence that Respondent would have issued the same discipline to Rowland even absent her union activity. (ALJD 19:2-21:51.)

As discussed herein, the Panel does not even include the ALJ's analysis of why Respondent met its burden under *Wright Line* – part of six-plus pages of the ALJ's Decision inexplicably left out of the Panel's Decision and Order – and the Panel both omits and misstates facts material to the ALJ's conclusion. Unlike the ALJ, the Panel assigns far too much weight to the "all about the Union" comment, while ignoring factual findings by the ALJ which detract from that weight. The Panel fails to account for the ALJ's reasons for finding Rowland's discharge was lawful notwithstanding the ALJ's finding that this comment was made.

VI. CONCLUSION

Respondent respectfully asks the Board to vacate the Panel's Decision and Order to the extent it concludes Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Rowland, and to affirm the ALJ's

conclusion that Respondent did not violate the Act when it suspended and discharged Rowland.

DATED: August 3, 2018

Respectfully submitted,

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 15760 Ventura Boulevard, Eighteenth Floor, Encino, California 91436.

On August 4, 2018, I served true copies of the following document(s) described as **RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER** on the interested parties in this action as follows:

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☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** By electronic mail transmission from jmanier@brgslaw.com on August 4, 2018, by transmitting a PDF format copy of such document(s) to each such person at the e-mail address listed below their address(es). The document(s) was/were transmitted by electronic transmission and such transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 4, 2018, at Encino, California.

John J. Manier

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